

INITIAL STATEMENT OF REASONS NON-CONTROLLING SUMMARY

Sales and Use Tax Regulations 1602, Food Products, and 1591, Medicines and Medical Devices

Specific Purpose

The purpose of the proposed amendments to California Code of Regulations, title 18, sections 1602, *Food Products* and 1591, *Medicines and Medical Devices*, respectively, is to clarify that when dietary supplement and adjunct products do not meet the definition of food under subdivision (a)(4) and are furnished by a physician to his or her own patient as part of a medically supervised weight loss program to treat obesity, such products are regarded as “medicine.” A new subdivision (e)(7) is added to Regulation 1591 to explain that when a dietary supplement or adjunct product does not qualify as a food product, it qualifies as a medicine under certain conditions.

Necessity

This regulation is necessary to provide clarification to taxpayers and staff regarding whether sales of dietary supplement and adjunct products that are furnished by a physician as part of a medically supervised weight loss program to treat obesity may qualify for exemption from tax as food products or as medicines.

Factual Basis

In the audit of a weight loss clinic, Board of Equalization (BOE) staff questioned how tax applied to sales of very low calorie meal replacement products. The products were in liquid or powdered form, provided 800 calories or less per day, and were furnished by a physician operating a weight loss clinic. At issue was whether sales of the products qualified as exempt sales of food or medicines.

In general, sales of food products for human consumption are exempt from tax pursuant to Revenue and Taxation Code (RTC) section 6359 unless otherwise excluded from the exemption by statute. As relevant to this issue, subdivision (c) of RTC section 6359 provides:

“For purposes of this section, “food products” do not include medicines and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts.”

Regulation 1602(a)(4) provides an example of a complete dietary food, as contrasted with a dietary supplement or adjunct, as a product that provides the user daily with at least 900 calories, 70 grams of high quality protein, and minimum daily requirements as established by the Federal Food and Drug Administration of specified vitamins and minerals. Board staff has historically used the example in 1602(a)(4) to determine the minimum number of calories, grams of protein, and other vitamins per day that a meal replacement product must provide in order to be regarded as a complete dietary food rather than a dietary supplement or adjunct. Accordingly, a sale of a meal replacement product which provides fewer than 900 calories per day by itself would not qualify for exemption from tax as a sale of a food product, but would be subject to tax as a sale of a dietary supplement or adjunct in the absence of another exemption.

RTC section 6369, subdivision (a)(2) provides that the sale or use of medicines furnished by a licensed physician to his or her own patient for treatment of the patient is exempt from taxation. The term “medicines” includes any substance or preparation intended for use by “internal application to the human body in the diagnosis, cure, mitigation, treatment, or prevention of disease and commonly recognized as a substance or preparation intended for that use.” Very low calorie meal replacement products meet the definition of a “medicine” because they are intended for use by internal application to the human body in the treatment of obesity, which commonly is recognized as a disease. Therefore, when these products are furnished by a physician to his or her own patient as part of a medically supervised weight loss program to treat obesity, although the sales of these products do not qualify as exempt sales of food products, the sales qualify for exemption as exempt sales of medicines.

No mandate Regarding Use of Specific Technologies

The proposed amendments do not mandate the use of specific technologies or equipment.

Initial Determination Regarding Alternatives

The Board does not believe that the proposed amendments will have any adverse impact on small business, and has made an initial determination that there are no reasonable alternatives to the proposed amendments, which would lessen any adverse impact on small business.